

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES AND TERRI COOK, husband)
and wife,)

Respondents/)
Cross-Appellants,)

v.)

BRENT AND DIANE L. STOVALL,)
husband and wife,)

Appellants/)
Cross-Respondents,)

and)

WASHINGTON FEDERAL SAVINGS, a)
Washington savings bank; KEY BANK)
NATIONAL ASSOCIATION,)

Defendants/)
Third Party Plaintiffs,)

v.)

JACK WILLIAMS & ELIZABETH)
WILLIAMS, husband and wife,)

Third Party)
Defendants.)

No. 56818-3-I
(consolidated with 57082-0-I)

DIVISION ONE

UNPUBLISHED OPINION

FILED: September 25, 2006

PER CURIAM --- A defendant in an ejectment action must plead affirmative defenses. Because Cook did not raise the defense of parol agreement and the parties did not argue it by agreement at trial, the trial court erred in using it as the basis for its determination. We reverse the trial court's decision and remand for further proceedings. Where the rights of an innocent third party would be adversely affected, the courts will not grant reformation of a contract. Because the evidence on summary judgment showed that Stovall did not have notice that Cook and Williams intended Cook's easement to exclude even the property owner from using the easement, we affirm the trial court's dismissal of the summary judgment motion.

FACTS

James and Terri Cook (Cook) purchased land designated Parcel A and Parcel B. Cook sold Parcel B to Jack and Elizabeth Williams (Williams) by statutory warranty deed dated July 31, 1992. To allow Cook to retain access to their property from the road, Cook and Williams agreed to create a 30 foot easement on the east side of Parcel B. The purchase and sale agreement stated: "Seller reserves an easement on the easterly edge of property for ingress, egress & utilities." The statutory warranty deed stated: "Seller reserves a non-exclusive easement over the East 30 feet of the above described property for ingress and egress and utilities." Williams installed a fence 30 feet west of an existing fence on the eastern boundary line of the property to mark the boundaries of the easement. Cook paved the roadway over the easement and was the only user.

In addition to marking the easement, Cook and Williams agreed that Williams would fence their parcel to separate it from Cook's property. They went into the field and, using an existing fence, marked a line using a compass. Both Cook and Williams testified that they agreed that everything on one side of the fence belonged to Cook and everything on the other side belonged to Williams. Cook stored equipment on his side of the fence from that time on.

Williams sold their parcel to Brent and Diane Stovall (Stovall) on April 1, 1996. The statutory warranty deed set out the legal description of the property and stated that the east 30 feet of the property was subject to an easement for the purpose of ingress, egress and utilities. In a declaration to the court, Williams stated that he and his wife never made use of the easement and that they agreed with Cook that Cook would be the sole user of the easement, even to the exclusion of Williams. The declaration further states that Williams told Stovall that Cook would be the only one using the roadway on the easement.

In 1997, Stovall noticed that gravel from the easement was encroaching onto his farmland. During a subsequent discussion about the gravel, Stovall and Cook disagreed regarding the extent and nature of the easement.

Cook had a survey done on an abutting parcel of land in 1998. The surveyor discovered a corner monument that neither Cook nor Williams knew was there. After seeing the position of the monument and a fence built along the neighboring property line, Stovall realized that the north fence was not on the legally described property line.

When he spoke with Cook about the discrepancy, Cook agreed that this fence was not on the property line and told Stovall he could move the fence on the condition that he obtain a survey first. Stovall did not obtain a survey or move the fence because he thought it would cause more problems between him and Cook.

Cook filed an action against Stovall on May 21, 2003, seeking reformation of the statutory warranty deed between Cook and Williams to state:

Seller reserves an exclusive easement and the sole right of use and access to the East 30 feet of the above described property for ingress, egress, and utilities, even to the exclusion of the Grantees, and their successors in interest.

Stovall filed a counterclaim for ejectment from that part of the property north of the north fence and south of the legally described property line. On summary judgment, the trial court dismissed Cook's motion for reformation. After a trial, the court dismissed Stovall's action for ejectment. Both parties appeal.

EJECTMENT

Stovall contends that the trial court erred in basing its decision on a theory that was not raised or argued by either party and in making certain findings of fact and conclusions of law. The trial court's findings of fact and conclusions of law stated that the common boundary line between the parties was established by parol agreement, which neither party raised or argued. Further, the trial court expressly did not reach the issues of adverse possession or acquiescence, which the parties argued at trial. We review asserted errors of law de novo.¹

¹ Pinecrest Homeowners Ass'n. v. Glen A. Cloniger & Assocs., 151 Wn.2d 279,

In responding to a complaint for ejectment, “[t]he defendant shall not be allowed to give in evidence any estate in himself or another in the property . . . unless the same be pleaded in his answer.”² Defendants in an ejectment action must plead their defenses in order to present supporting evidence at trial.³ But where “issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”⁴ Although Cook never filed an answer to Stovall’s counterclaim, the parties litigated the theories of adverse possession and acquiescence by agreement. Because the defense of parol agreement was not raised either in a pleading or by agreement, the trial court erred in using this theory to determine the action.

Adverse possession, acquiescence and parol agreement are three different theories recognized in Washington to resolve boundary disputes in the absence of executing and recording formal documents.⁵ There are, however, differences between the theories the parties argued and the theory the trial court used to decide the action. Adverse possession and acquiescence both require that the tenant in possession use the land for at least 10 years in addition to the other requirements of each theory, while parol agreement has no such requirement.⁶ Parol agreement requires that the

290, 87 P.3d 1176 (2004).

² RCW 7.28.130.

³ 18 William B. Stoebeck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 11.9 (2d ed. 2004).

⁴ CR 15(b).

⁵ Johnston v. Monahan, 2 Wn. App. 452, 469 P.2d 930, review denied, 78 Wn.2d 993 (1970).

⁶ Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984); Johnston, 2 Wn. App. at 456; Lamm v. McTighe, 72 Wn.2d 587, 593, 434 P.2d 565 (1967).

boundary line was disputed or uncertain, while the other theories do not.⁷

The evidence pertinent to dispute or uncertainty shows that Cook did not establish parcel agreement. Cook and Williams neither disputed nor were uncertain as to the boundary; rather, they thought they were marking the legally described boundary on the ground. Cook testified that there were no fences marking the property lines when Cook sold to Williams, and that Cook and Williams decided to “agree[] where the line would be”. Cook also testified that he admitted to Stovall that he had determined that the north fence was not on the legal boundary line and that the legal description included a line to the north of the fence. Williams testified that had he known the monument was there, he would have used it to set the line on the ground, and that he had what later turned out to be a mistaken impression that the line he and Cook set was on the true legal boundary line. The parties’ mistaken setting of what they thought was the true boundary was not equivalent to uncertainty or dispute.

REFORMATION

Cook contends that the trial court erred in making credibility determinations on summary judgment. We review an order on a motion for summary judgment *de novo* and engage in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the non-moving party.⁸ We consider the facts and all reasonable inferences from them in the light most favorable to the nonmoving

⁷ Id.

⁸ McClarty v. Totem Electric, 157 Wn.2d 214, 220, 137 P.3d 844 (2006).

party, and affirm summary judgment when reasonable minds could have reached but one conclusion.⁹

A party to a contract may obtain reformation if he proves by clear and convincing evidence that there was a mutual mistake or that one party was mistaken and the other party engaged in fraud or inequitable conduct.¹⁰ The courts will consider all facts pertinent to the parties' intention, including parol evidence.¹¹ Courts will not reform a contract between the original parties to the contract if it will unfairly affect the rights of innocent third parties,¹² including purchasers who later took title to the property without notice of the facts supporting the right to reformation.¹³

The evidence before the court at summary judgment shows that Cook and Williams intended that only Cook would use the easement. When Williams sold his property to Stovall, he told Stovall that Cook would be the only one using the roadway. But because the statutory warranty deed describes a non-exclusive easement, this information was not enough to give Stovall notice that Cook's easement excluded even Stovall. Williams did not tell Stovall that he could not use the roadway, and Stovall apparently interpreted the statement as meaning that because Cook was the only easement holder, only Cook would be using the easement. Because we conclude that

⁹ Bulman v. Safeway, Inc., 144 Wn.2d 335, 351, 27 P.3d 1172 (2001).

¹⁰ Wash. Mut. Sav. Bank v. Hedreen, 125 Wn.2d 521, 525, 886 P.2d 1121 (1994).

¹¹ Akers v. Sinclair, 37 Wn.2d 693, 704, 226 P.2d 225 (1950).

¹² Id. at 702.

¹³ Biles-Coleman Lumber Co. v. Lesamiz, 49 Wn.2d 436, 439, 302 P.2d 198 (1956).

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Cook did not present sufficient evidence to support reformation, we need not address the question of whether the trial court made an improper credibility determination.

CONCLUSION

We affirm the decision on summary judgment denying the motion for reformation.
We reverse the trial court's decision on the ejectment issue and remand for a
determination of the issues of adverse possession and acquiescence.

FOR THE COURT:

Ajd, J.

Grosse, J

Cox, J.